

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 v.) Case No.: 1:20-cv-0667
)
 8.929 ACRES OF LAND, MORE OR)
 LESS, SITUATE IN ARLINGTON)
 COUNTY, VIRGINIA, *ET AL.*,)
)
 Defendants.)
)
 _____)

Defendant FiberLight, LLC (“FiberLight”), submits this Response to Plaintiff United States of America’s Rule 71.1 Motion to Determine that Fair Market Value Has No Relevance to This Proceeding.

This case concerns the just compensation owed to Defendants for the taking of their interests in the property referenced in the Complaint (the “Subject Property”), including but not limited to the Subject Property located on Columbia Pike. Although Plaintiff’s Motion focuses on just compensation owed to Defendant Arlington County, Virginia (“Arlington County”), FiberLight has asserted that it is entitled to just compensation for any taking of its interest in the Subject Property. Answer, ECF No. 32 ¶ 9. Specifically, FiberLight has asserted that just compensation includes but is not limited to, the Plaintiff constructing new ducts banks and providing monetary compensation for any costs that may be incurred by FiberLight, including but not limited to, the costs of obtaining new conduit, fiber, and other equipment, moving any

conduit, fiber, and other equipment from the Subject Property, installing any conduit and other equipment in a new location, and splicing said fiber. *Id.*

ARGUMENT

The Fifth Amendment provides that private property shall not be taken for public use without “just compensation.” *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473, 93 S. Ct. 791, 794, 35 L. Ed. 2d 1, 7 (1973). “[J]ust compensation’ means the full monetary equivalent of the property taken.” *Id.*, 93 S. Ct. at 794, 35 L. Ed. 2d at 7. “The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.” *Id.* at 473-74, 93 S. Ct. at 794, 35 L. Ed. 2d at 7. The Court has repeatedly held that just compensation normally is to be measured by “the market value of the property at the time of the taking contemporaneously paid in money.” *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 454-55, 83 L. Ed. 2d 376, 382 (1984); *see United States v. Brooklyn Union Gas Co.*, 168 F.2d 391, 395, 1948 U.S. App. LEXIS 2056, at *11 (2nd Cir. 1948) (“It is axiomatic that as to property for which there is a market, the test is fair market value, and that compensation is measured, and limited by, the owner’s loss, not the taker’s gain) (citations omitted). “Deviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.” *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 455, 83 L. Ed. 2d 376, 382 (1984) (citations omitted). Here, Plaintiff has not presented any evidence as to whether the market value of FiberLight’s interest in the subject Property can be determined. Nor has Plaintiff presented any evidence as to why fair market value should not be used to determine the just compensation to which FiberLight is entitled. Plaintiff’s Motion is almost entirely concerned with Arlington County alone. Accordingly, Plaintiff’s Rule 71.1

Motion to Determine that Fair Market Value Has No Relevance to This Proceeding should be denied with respect to FiberLight.

Additionally, Plaintiff's Motion should be denied because Plaintiff has not demonstrated that substitute facilities would necessarily constitute just compensation with respect to FiberLight. "A taking may be justly compensated by payment of the cost of a substitute, so long as a full equivalent is afforded for the property taken." *Clarksville v. United States*, 198 F.2d 238, 242, 1952 U.S. App. LEXIS 3168, at *12 (4th Cir. 1952). Plaintiff's Motion's description of detailed negotiations and planning that occurred between the Plaintiff and Arlington County does not apply to FiberLight. Plaintiff has not yet made a final proposal as to what substitute facilities it can and will provide to FiberLight and there are certainly "substitute facilities" that would not constitute a "full equivalent" of the property being taken from FiberLight. For example, the construction of new ducts banks alone would not constitute a full equivalent for the property being taken because FiberLight may lose the conduit, fiber and equipment currently located on the Subject Property and have to obtain new conduit, fiber, and other equipment, install conduit and other equipment in a new location and splice the fiber. Therefore, substitute facilities may not fully compensate FiberLight, and therefore, they would not be sufficient to constitute just compensation.

Moreover, a determination as to whether fair market value is relevant to this proceeding is premature. See *Kern River Gas Transmission Co. v. 18.91 Acres of Land, etc.*, 809 F. Supp. 72, 1992 U.S. Dist. LEXIS 19815 (D. Nev. 1992) (denying the plaintiff's motion for summary judgment asking the court to bar defendants from seeking substitution damages because if the jury cannot readily ascertain the fair market value of the pipeline easement, defendants' additional costs incurred in providing reasonably necessary services will be the appropriate

measure of damages). This case is in its early stages and discovery is still ongoing. As stated above, it is not yet clear whether the fair market value of FiberLight's property interest can be determined or any whether substitute facilities offered by the Plaintiff would fully and justly compensate FiberLight for the property being taken by Plaintiff. Accordingly, any determination as to the relevance of fair market value with respect to FiberLight is premature, and the Court should deny Plaintiff's motion with respect to FiberLight.

Finally, FiberLight incorporates by reference the relevant arguments set forth in any Opposition or Response to Plaintiff's Motion filed by Defendant Arlington County or any other defendant.

CONCLUSION

Based on the foregoing, FiberLight requests that Plaintiff's Motion be denied with respect to FiberLight.

Dated: September 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I sent a copy of the foregoing to the following via U.S. Mail, postage prepaid:

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